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IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Court of Appeal for the First Appellate District

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTION PRESENTED

Does a parole condition requiring the parolee to consent to warrantless suspicionless searches that are not arbitrary, capricious or harassing violate the Fourth Amendment?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Parole is an important but risky part of the criminal justice system. While society can reap significant economic and rehabilitative gains from parole and other forms of conditional release, allowing convicted criminals to serve part of their

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

sentence in society instead of prison threatens public safety. Parole search conditions play an important role in limiting parole's danger to society by deterring parolees from committing crimes. Upholding California's parole search conditions preserves public safety and helps the rehabilitation of parolees, which is consistent with the rights of victims and society that the CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On September 6, 2002, San Bruno Police Department Officer Alex Rohleder observed the defendant, Donald Curtis Samson, walking down the street with another adult and baby. Joint Appendix ("J.A.") 10. Samson was on parole for the crime of possessing a firearm by an ex-felon. See J. A. 49; Cal. Penal Code § 12021. Officer Rohleder knew that the defendant was on parole and had heard from other officers that Samson might have a parolee at-large warrant out against him. See J. A. 10. The officer stopped the vehicle and made contact with Samson. *Ibid.* While Samson stated that he had taken care of the warrant, and was in good standing with his parole officer, Officer Rohleder decided to conduct a " 'parole search' " of the defendant. See *ibid.* The sole justification for the search was the search condition of Samson's parole. See *ibid.* One condition of Samson's parole was "that he agreed to 'search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a warrant with or without probable cause.' " J. A. 10-11, n. 3. While Officer Rohleder does not always search parolees, he does so regularly. See J. A. 11. The officer found a cigarette box which contained methamphetamine. See *ibid.*

Samson was convicted of possession of methamphetamine in a jury trial. See J. A. 2. The California Court of Appeal rejected his Fourth Amendment attack on his parole search based on a precedent of the California Supreme Court, J. A. 13-14, and affirmed the conviction with a minor correction. J. A. 29.

The California Supreme Court denied discretionary review on January 13, 2005. J. A. 30. This Court granted certiorari on September 27, 2005.

SUMMARY OF ARGUMENT

Public safety is the Achilles' heel of any parole system. While society can reap substantial benefits from this less costly and more rehabilitative alternative to prison, having convicted criminals serve their sentence in society gambles with public safety. A parole system that cannot protect the public will lose support.

The threat to public safety from parolees is all too real. Studies of felony probationers and parolees show a recidivism rate that is between six to nineteen times the arrest rate for the general population. Probationers and parolees were thus responsible for at least thousands of murders and tens of thousands of other serious felonies.

Allowing both police and parole officers to conduct parole searches helps deal with this problem. Having more officers available for searching supplements the resources of chronically understaffed probation departments. Police are also better trained and more experienced at conducting searches than probation officers. This makes parole searches both more frequent and more effective, which further deters parolee crime. In addition to protecting the public, it also aids in the parolee's rehabilitation.

The threat to public safety posed by parole creates a special need for more extensive supervision of parolees. Certain threats to public safety create special needs for dispensing with the Fourth Amendment's warrant and suspicion requirements. The fact that the particular public safety interest is related to crime prevention does not disqualify it from special needs status, as is demonstrated by airport checkpoints, courthouse searches, sobriety checkpoints, and informative roadblocks.

Allowing a police officer to enforce the search condition does not violate a defendant's reasonable expectation of privacy. There is no right to parole. If the state can deprive a defendant of all Fourth Amendment rights through a prison sentence, then the much lesser Fourth Amendment deprivation found in this case must also be reasonable. Balancing the defendant's minimal privacy interests against society's considerable interest in protecting the public from parolees justifies the search in this case.

ARGUMENT

The present case takes *United States* v. *Knights*, 534 U. S. 112 (2001) and *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987) to the next step. Parole, probation, and other forms of supervising convicted criminals short of imprisonment are vital components of the criminal justice system. See Wilentz, The Partnership of Judges and Probation—Back to the Community, 49 Rutgers L. Rev. 1147, 1150-1151 (1997). While these punishments allow criminals to be supervised at considerably less direct cost to society and can provide a greater means for rehabilitation, public safety is the Achilles' heel of supervisory release. These methods of punishment release convicted criminals into the public, an inherently dangerous proposition which requires that the state be able to monitor the released prisoners effectively. The present case will determine just how effectively the government can protect society from prisoners serving their sentences outside of prison. This case is not about giving the authorities carte blanche to search parolees. California limits the timing and duration of the search, and California's parole searches cannot be arbitrary or oppressive. See *People* v. *Reyes*, 19 Cal. 4th 743, 753-754, 968 P. 2d 445, 451 (1998). While those parole searches do not have to be justified by some form of suspicion other than the status of being on parole, they are still subject to some form of review. This type of search, and nothing more, is at issue in this case.

I. The threat to public safety posed by parolees creates a special need for close supervision of them by police and parole officers.

Maintaining public safety is an essential part of any parole or probation system. See, *e.g.*, *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987); 18 U. S. C. §§ 3562(a), 3553(a)(2)(C); *People* v. *Burgener*, 41 Cal. 3d 505, 532, 714 P. 2d 1251, 1268 (1986); Cal. Penal Code § 3000. While *Griffin* relied on both public safety and rehabilitation to support a special needs finding, see 483 U. S., at 875, the special threats to public safety posed by parolees is sufficient on its own to justify suspicionless searches by police and parole officers in the manner allowed by the California courts.

A. The Threat.

Supervisory release systems must place public safety before any other interest. While society may benefit from employing the cheaper and potentially more rehabilitative parole instead of prison, this form of punishment gambles with public safety. Anyone who is eligible for parole has already demonstrated an unwillingness to conform to the law. See *Griffin*, 483 U. S., at 880. Parolees are thus a far greater threat to commit crimes than the generally law-abiding citizens with whom they share freedom. If a supervisory release system cannot protect the public, public support for it will erode. See Petersilia, Probation in the United States: Practices and Challenges, National Institute of Justice Journal, No. 233, p. 2 (Sept. 1997) (cited below as "Probation in the United States").[2]

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2. Although this case addresses a search condition for parolees, this brief utilizes research and cases on both probation and on parole. There are no differences between the two that should prevent the use of research on probation from supporting the search condition in the present case. This Court generally does not distinguish between the two, as it applies the same due process standard to their revocation hearings, see *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782 (1973), and often uses the terms conjunctively. See, *e.g.*, *Connecticut Bd. of Pardons* v. *Dumschat*, 452

Unfortunately, the threat to public safety is all too real. While this subject has not been researched as extensively as it should be, see Mackenzie et al., The Impact of Probation on the Criminal Activities of Offenders, 36 Journal of Research in Crime and Delinquency 423, 424 (1999), recidivism studies still show that probationers and parolees are responsible for a disturbingly large proportion of crimes.

These studies center on felony probationers. Typically, recidivism is calculated by counting the number of these probationers who have been arrested for a felony during the first 3 years of probation.[3] See Benedict & Huff-Corzine, Return to the Scene of the Punishment: Recidivism of Adult Male Property Offenders on Felony Probation, 1986-1989, 34 Journal of Research in Crime and Delinquency 237, 241 (1997); Langan, Between Prison and Probation: Intermediate Sanctions, 264 Science 791, 792 (May 6, 1994). Estimates of the recidivism rates for felony probationers range from 22% to 65%. See Benedict & Huff-Corzine, *supra*, at 239. A federal study found that 43% of 79,000 probationers were arrested for a felony within a three-year period of probation. See U. S. Department of Justice, Bureau of Justice Statistics, Recidivism of Felons on Probation, 1986-1989, pp. 1, 6 (1992) (Table 4). Indeed, drug use is the best predictor of whether someone will reoffend while on probation. See Mackenzie, *supra*, 36 Journal of Research in Crime and Delinquency, at 439 (Table); Benedict & Huff-Corzine, *supra*, at 245-246. Unfortunately, drug use is far too common among parolees. See Blenko, The

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U. S. 458, 464 (1981); *Reno* v. *Flores*, 507 U. S. 292, 322-323 (1993) (Stevens, J., dissenting). Given the relative lack of research on parole, see Petersilia, Parole and Prisoner Reentry in the United States, in Prisons 479, 486 (M. Tonry & J. Petersilia eds., 1999), it makes sense to utilize both probation and parole research, and to refer to the two interchangeably.

3. Arrest figures understate the scope of the problem, since many crimes never result in an arrest. See *infra*, at 8.

Challenges of Integrating Drug Treatment Into the Criminal Justice Process, 63 Albany L. Rev. 833, 858 (2000).

Even at the lowest recidivism rate, parolees and probationers are much more dangerous to the community than the average citizen. A 22% felony arrest rate over a 3-year period for the general population is unthinkable. Arrest figures reinforce this common sense conclusion. Since several of the recidivism studies took place in the mid-1980's, see Benedict & Huff-Corzine, *supra*, at 238-239, *amicus* will use the 1986 arrest figures for the general population as a comparison figure. In 1986, the arrest rate for Federal Bureau of Investigation (FBI) "index" crimes (the combined arrest rates for 5 violent crimes and 4 property crimes) was 1,091.8 per 100,000 or 1.0918%. U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1987, p. 368 (1988). Assuming that no person is arrested for more than one index crime during any 3-year period at the 1986 rates, the general population rate would be about 3% for the period. The lowest estimated recidivism rate for prisoners on supervisory release, 22%, would still be more than six times this hypothetical arrest rate for the general population, while the high rate of 65% recidivism is over 19 times this arrest rate.

The FBI index is not ideal for comparison, however, as it both includes nonfelonies and excludes felonies from its total. Thus the larcenies counted in the index include many misdemeanor larcenies such as shoplifting. See *id.*, at 563. Similarly, the crime index does not count felonies that do not fall into the property or violence classifications, primarily drug and weapons offenses. See *id.*, at 368, 562-563. Since the drug and weapons arrest totals also do not distinguish between misdemeanors and felonies, adding drug and weapons offenses to the index crimes would create an excessively conservative figure, but one that is still far below the recidivism rate for felony parolees or probationers. The 1986 arrest rate per 100,000 population for drug offenses was 348.6 or 0.3486%, *id.*, at 368, and 80.7 per 100,000 or 0.087% for weapons

offenses. *Ibid.* When added to the index rate of 1.0918%, this would give an annual arrest rate of 1.5274%. Over a 3-year period the maximum arrest rate under this most conservative reasonable estimate would be 4.5822%, which is still less than one quarter of the lowest estimated recidivism rate for probationers, and one-fourteenth of the high rate.

The actual difference is undoubtedly much greater. First, each arrest in the FBI total does not involve a different person; some people will be arrested for more than one index crime during a year or over a 3-year span. See *id.*, at 367, note. More importantly, the arrest rate for those not on supervisory release is actually lower than the total crime index because that index includes the arrests of probationers and parolees, who have a much higher arrest rate than the civilian population.

A parolee's threat to public safety is underscored by the high proportion of state prisoners who were on parole at the time of their offense. As of 1991, 22% of all state prisoners were parole violators, see U. S. Dept. of Justice, Bureau of Justice Statistics, Probation and Parole Violators in State Prison, 1991, p. 3 (1995), and 43% of parole violators had been arrested for a new offense. See *ibid.* "Based on the offense that brought parolees back to prison, [in 1991] these 156,000 offenders committed at least 6,800 murders, 5,500 rapes, 8,800 assaults, and 22,500 robberies, while under supervision in the community an average of 13 months." *Id.*, at 1. Because many crimes go unreported, see U. S. Dept. of Justice, Bureau of Justice Statistics, Criminal Victimization 2003, p. 10 (2004), or unsolved, these arrest figures understate the costs of parole. A ratio of 10 crimes committed to every arrest is considered "a conservative figure," Petersilia & Turner, Prison Versus Probation in California: Implications for Crime and Offender Recidivism, in Community Corrections: Probation, Parole, and Intermediate Sanctions 61, 64 (Petersilia ed. 1998). The federal government has estimated that recidivism of parolees and probationers results in "[p]robation and parole violators . . . compris[ing] 30% of all offenders in State prison for a violent

crime." Probation and Parole Violators in State Prison, at 1. Therefore, the real cost of parole and probation is much higher than the arrest records estimate.

California's experience is no different. The rate of parolees returned to prison with a new term of imprisonment was 13.9% in 2004 and ranged from 10.6% to 21.1% between 1992 and 2003. See California Department of Corrections and Rehabilitation, California Prisoners and Parolees 2004, p. 48 (2005), http://www.corr.ca.gov/OffenderInfoServices/Reports/Annual/CalPris/CALPRISd2004.pdf. Their crimes in 2004 include 97 murders, 591 robberies, 543 assaults with a deadly weapon, 29 rapes, and 56 child molestations. See *id.*, at 49. Within two years of parole 52.83% of California parolees were returned to prison for either new offenses or parole violations. See *id.*, at 84. Parole is a dangerous proposition, even with intensive supervision.

This empirical evidence reinforces the common-sense conclusion that placing convicted criminals in society rather than prison is dangerous enough with adequate supervision, and intolerably dangerous without it. While not every parolee and probationer is equally dangerous, this defendant, with a prior felony conviction, posed a real risk of reoffending. This risk forms a powerful justification for the search in this case.

B. Policing the Bargain.

Parole is a sort of bargain between the parolee and society. The parolee is allowed to remain out of prison "in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 365 (1998); see also *Young* v. *Harper*, 520 U. S. 143, 147-148 (1997). Both sides can benefit from the bargain. The defendant reduces his time in prison and may have a better chance at rehabilitation, while the state gets a less expensive alternative to prison, at least in direct costs. See Petersilia & Turner, *supra*, at 65. Although parole in California does not involve consent on the

part of parolee, see *infra*, at 18, the parolee's release is still conditional.

A parolee who commits a crime breaks the bargain. Crime is a cost not found in most economic comparisons between parole and prison. While parole or probation is not simply an economic issue, understanding its cost helps to determine whether society is getting the benefit of its bargain with probationers. This hidden cost of probation and parole crime makes it likely "that felony probation sentences are more expensive than is commonly assumed, both absolutely and relative to imprisonment . . . ." Petersilia & Turner, *supra*, at 65. Making sure that parolees keep their side of the bargain and imprisoning those who don't is an " 'overwhelming interest' " of the state. See *Scott*, 524 U. S., at 365 (quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 483 (1972)).

Search conditions can help to control the crime expense and preserve society's overwhelming interest in controlling parolees. Parole and probation "restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Griffin*, 483 U. S., at 875. By dispensing with warrants, search conditions help the authorities respond more "quickly to evidence of misconduct," *id.*, at 876, and more importantly, help deter probationers from committing crimes. See *ibid.* Too many restrictions on the officer's ability to search the probationer or parolee "would reduce the deterrent effect of the supervisory arrangement. The probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected." *Id.*, at 878 (discussing probable cause requirement).

> "Being on parole with a consent-to-search condition is akin to sitting under the Sword of Damocles: With knowledge he may be subject to a search by law enforcement officers at any time, [the parolee] will be less inclined to

have narcotics or dangerous drugs in his possession. *The purpose of an unexpected, unproved search of defendant is to ascertain whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law.* Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation." *State* v. *Benton*, 695 N. E. 2d 757, 761 (Ohio 1998) (emphasis in original; internal quotation marks omitted).

While police officers may not share the parole officer's interest in rehabilitation, cf. *Griffin*, *supra*, 483 U. S., at 876, this does not invalidate a search based upon the public safety special interest found in this case. The danger posed by parole crime creates a special need separate from the rehabilitation aspect of *Griffin*. See Part I-C, *supra*. In any event, the deterrence and supervision advanced by police searches also helps to rehabilitate the parolee. Deterring criminal activity can only help the rehabilitation process, as a parolee who commits crime is not rehabilitated.

If society cannot place an effective search condition upon probationers or parolees, then opportunities for early release may dry up. Parolees, probationers, and society should be allowed to continue getting the benefit of the type of bargain found in this case. If not, then society is likely to change that bargain to the detriment of convicted criminals.

Parole is only a conditional release from state custody. The parolee must abide by certain rules imposed by the state or lose his or her liberty. See *Scott*, 524 U. S., at 365; *Young*, 520 U. S., at 147. A typical condition is that the parolee not break the law. See, *e.g.*, Petersilia, Parole and Prisoner Reentry, *supra*, at 503. In California, conviction for a crime can be good cause for revocation of parole. See 3 B. Witkin & N. Epstein, California Criminal Law § 644, p. 846 (3d ed. 2000). A suspicionless search condition will make it easier to determine whether parolees are obeying the law. Given the

considerable risk of reoffending posed by parolees and probationers there is a special need to monitor probationers and parolees. The only question is the extent of this need.

C. Public Safety as a Special Need.

In *United States* v. *Knights*, 534 U. S. 112 (2001), this Court recognized that the threat of recidivism posed by probationers helped support a warrantless search of the probationer's house based upon reasonable suspicion. See *id.*, at 120-121. It noted the high rate of recidivism among probationers, and their extra incentives to conceal evidence of criminal behavior. See *id.*, at 120. The legality of suspicionless searches was not decided in *Knights*. See *id.*, at 120, n. 6. The public safety interests recognized in *Knights* and other cases also support a special need for the type of suspicionless searches of parolees found in California.

While allowing suspicionless searches of parolees promotes public safety, see part I B, *supra*, the question remains as to whether this interest qualifies as a special need under the Fourth Amendment. The special needs that allow law enforcement to dispense with the warrant and lower the necessary suspicion must go beyond society's general interest in law enforcement. See, *e.g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989). Society's interest in protecting itself from the substantial dangers posed by parolees like the defendant satisfies this standard.

The legitimacy of this interest is found in *Griffin* itself. The *Griffin* Court noted that probation was like incarceration, a form of punishment for convicted criminals. See 483 U. S., at 874. Therefore probationers, like prisoners, "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.' " *Ibid.* (quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972)). The special needs in *Griffin* were the reasons for the limits on the probationer's liberty, making sure that "probation serves as a period of genuine rehabilitation

and that the community is not harmed by the probationer's being at large." *Id.*, at 875.

Public safety can qualify as a special need without being attached to rehabilitating parolees. In other contexts, a sufficient threat to public safety supports special needs searches. Thus, drug testing of railway employees involved in certain train accidents was reasonable.

> "The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, 'likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.' " *Skinner*, 489 U. S., at 620 (quoting *Griffin*, 483 U. S., at 873-874).

Since the employees covered by the relevant regulations were "engaged in safety-sensitive tasks," *Skinner*, 489 U. S., at 620, the threat to public safety of drug or alcohol-impaired railroad employees created a special need for the drug testing requirement.

> "This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also 'require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed.' " *Skinner*, 489 U. S., at 621 (quoting *Griffin*, 483 U. S., at 875).

The public safety interest in *Skinner* was relatively removed from law enforcement interests. Train accidents are not necessarily criminal acts, even if intoxication is involved, and this Court left undecided whether the routine use of the tests results in criminal cases would unconstitutionally subvert "the administrative nature of the FRA's program." 489 U. S., at 621, n. 5. But *Skinner* does not set the boundary of the public

safety interest. Special public safety concerns that are much more congruent with law enforcement needs still qualify as special needs.

Griffin is one example. The proceeds of a search substantially justified by public safety were used in a criminal prosecution against the subject of the special needs search. See *Griffin*, 483 U. S., at 870. Indeed, the search condition was justified in part by the fact that sudden searches would deter probationers from committing crimes. See *id.*, at 876. Similarly, drunk driving roadblocks were upheld by this Court even though those who failed the sobriety tests would be arrested. See *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 447 (1990).

Although the *Sitz* opinion did not clearly classify itself as a special needs case, subsequent analysis shows that its public safety rationale is closely allied to law enforcement interests.

> "This checkpoint program [in *Sitz*] was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in our determination that the program was constitutional." *City of Indianapolis* v. *Edmond*, 531 U. S. 32, 39 (2000).

The roadblock in *Edmond* was struck down because its purpose, narcotics interdiction, was just part of a general interest in crime control. See *id.*, at 42. While narcotics are undoubtedly dangerous, it is a generalized danger with no particular ties to automobiles. "Only with respect to a smaller class of offenses, however, is society confronted with the type of *immediate, vehicle-bound* threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate." *Id.*, at 43 (emphasis added).

Edmond must not be read too broadly. The more general language in that opinion must be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to circumstances that the Court was not then considering." *Illinois* v. *Lidster*, 540 U. S. 419, 424 (2004). *Edmond*'s "general interest in crime control" is not synonymous with "every 'law enforcement' objective." *Ibid.* Although it is a public safety interest, protecting the public from parolees is far from *Edmond*'s general law enforcement interest.

The present case is more closely analogous to *Sitz* than *Edmond*. The search condition is limited to parolees, a group which presents a significant, special threat to public safety. See Part I-A, *supra*. There was no logical limit to the roadblock in *Edmond*. If it was upheld, "the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." 531 U. S., at 42. The logic of parole searches is much more limited, extending no further than parolees. Also, California law places some limits on the authority to search under the parole condition. Oppressive or arbitrary searches are not allowed under the search condition. *People* v. *Reyes*, 19 Cal. 4th 743, 753-754, 968 P. 2d 445, 451 (1998). The limited, special need in this case is not diminished by *Edmond*.

An interest is not disqualified from being special if it is related to crime prevention. If there is something about a particular situation or relationship that makes it unusually dangerous to public safety, then a special needs search may be justified. "[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings." *Chandler* v. *Miller*, 520 U. S. 305, 323 (1997).

This is illustrated by the purest public safety special needs searches, airport and courthouse checkpoints. Millions of innocent individuals are subjected to electronic intrusions upon

"their persons . . . and effects," cf. U. S. Const., Amdt. 4, simply because the threat to public safety from terrorism in airplanes made any other response unreasonable.

> " 'When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.' " *United States* v. *Edwards*, 498 F. 2d 496, 500 (CA2 1974) (emphasis added by *Edwards* Court) (quoting *United States* v. *Bell*, 464 F. 2d 667, 675 (CA2 1972) (Friendly, J., concurring)), quoted with approval in *Treasury Employees, Inc.* v. *Von Raab*, 489 U. S. 656, 675, n. 3 (1989).

Courtroom searches provide an even better example of how the need for suspicion can give way to security needs. People entering courts are often subject to suspicionless searches like the airport checkpoints. See 5 W. LaFave, Search and Seizure § 10.7(a), pp. 313-314 (2004). These searches can be even more intrusive than their airport counterparts. While people freely subject themselves to the airport searches in order to travel by air, witnesses and jurors are compelled by law to enter courthouses and subject themselves to the search. In spite of this, courts routinely uphold these searches. See *id.*, at 314-316. Parolees pose a much greater threat to safety than the average airline passenger or courthouse denizen, which justifies greater level of intrusion than found in those searches.

Parole presents an unusual danger to public safety, releasing into society an individual who "is more likely than the ordinary citizen to violate the law." *Griffin*, 483 U. S., at 880; see also *United States* v. *Knights*, 534 U. S. 112, 120 (2001). It is a danger that is all too real. See Part I-A, *supra*. It is "a concrete danger demanding departure from the Fourth Amendment's main rule." Cf. *Chandler*, 520 U. S., at 319. Given the high

likelihood of reoffense, there is a special need to closely monitor parolees. In essence, parolees are inherently suspicious. They are proven guilty, not presumed innocent. They pose a far greater risk to public safety, and consequently must be monitored much more closely than the presumptively innocent person.

II. The search condition did not violate any reasonable expectation of privacy of the defendant.

Following general Fourth Amendment practice, in special needs cases this Court has "not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989). In addition to Fourth Amendment reasonableness analysis, this Court will also uphold warrantless or suspicionless searches that are justified by special needs. See, *e.g.*, *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987). In *Griffin*, this involved justifying a regulatory system that applied a search condition to every grant of probation. See *id.*, at 870-871. That inquiry took place in the context of the probationer's very limited privacy interests. See *id.*, at 874. This Court then concluded that both the warrant and probable cause requirements would needlessly interfere with the special needs of the probation system. See *id.*, at 877-878. Even without special needs, departures from the warrant and probable cause requirements can be justified under the general balancing of interests that is the foundation of Fourth Amendment analysis. See *United* States v. *Knights*, 534 U. S. 112, 117-118 (2001).

One difference between the two cases is that Samson had notice that consent to suspicionless searches was a condition of his parole, see Cal. Penal Code § 3067(a), while the search condition was imposed retroactively on Griffin. See *Griffin*, 483 U. S., at 870-871, and n. 1 (crime in 1980, regulation promulgated in 1981). This substantially reduces defendant's

expectation of privacy, placing his search on an even more solid constitutional footing than the one ratified in *Griffin*.

This does not mean that the search condition was consensual in the same sense as a contract between equal parties or even the consent to probation raised by the government in *Knights*. See 534 U. S., at 118. Unlike probation, which can be refused, in California the prisoner must accept parole. See *People* v. *Reyes*, 19 Cal. 4th 743, 749, 968 P. 2d 445, 448 (1998). Although there is no consent in the traditional sense, Samson is still serving a conditional release from prison. Cf. *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 365 (1998) (parole as conditional release). He must abide by his conditions of parole, or risk losing his conditional freedom for the much greater invasion of privacy found in prison. Unlike *Griffin*, the search condition was in the law before he started his parole. The condition was part of Samson's sentence. While more invasive than the conditions upheld in *Knights* and *Griffin*, California's search condition serves the vital interests of protecting public safety and helping to determine whether Samson is following his parole conditions.

The parole search condition in this case is part of the defendant's sentence, as it is now for every person convicted of a parole-eligible crime in California. See Cal. Penal Code § 3067. When Samson committed the crime for which he was eventually paroled, the search condition was part of the punishment that he had notice was a consequence of conviction. While the defendant may not have genuinely consented to his search condition, see *Reyes*, 19 Cal. 4th, at 749, 968 P. 2d, at 448, the fact that this is part of the statutory definition of parole reduces his reasonable expectation of privacy.

A felony conviction entitles the state to make substantial inroads upon the prisoner's privacy. A state does not have to offer parole instead of prison. It is an "act of grace" from the state to the parolee. See *Escoe* v. *Zerbst*, 295 U. S. 490, 492 (1935) (probation); *People* v. *Rodriguez*, 51 Cal. 3d 437, 445,

795 P. 2d 783, 788 (1990). While this does not deprive the parolee of other rights such as due process, see *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782, n. 4 (1973) (distinguishing *Escoe*), parole's status as a privilege is relevant to the Fourth Amendment analysis.

The state can deprive a convicted criminal of all of his or her Fourth Amendment rights.

> "Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate *any* subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches *does not apply* within the confines of the prison cell." *Hudson* v. *Palmer*, 468 U. S. 517, 525-526 (1984) (emphasis added).

If this complete deprivation of Fourth Amendment rights is constitutional, then it is reasonable for a state to subject a grant of parole to a lesser, albeit broad, deprivation such as the search condition in the present case.

Prison inmates lose their expectation of privacy in prison for several reasons. The loss of privacy in one's cell is broadly supported by "the concept of incarceration and the needs and objectives of penal institutions." *Id.*, at 526. Institutional security was a significant concern, see *id.*, at 526-527, along with similar concerns like controlling the flow of contraband and maintaining sanitation. See *id.*, at 527. Parole raises similar concerns. Parolees and probationers pose a significantly greater risk to public safety than the average person. See Part I, *supra*. Discouraging the parolee from obtaining drugs or firearms is consistent with the rehabilitative and public safety goals of parole. See Part I-B, *supra*. These create a special need for a substantially reduced expectation of privacy for parolees. See Part I-C, *supra*.

Sentences are not just about security and rehabilitation. In addition to incapacitating criminals and giving them opportunities to rehabilitate, sentences also punish. If prison, or sentences short of prison, are to succeed, they must first punish the criminal. The quality of punishment gives the criminal law its deterrent, and the punitive quality of sentencing also serves the worthwhile goal of retribution. See *Gregg* v. *Georgia*, 428 U. S. 153, 183-186 (1976) (lead opinion). If the consequence of a criminal conviction does not punish, then it is not a sentence.

This need to punish is another justification for depriving convicted criminals of their privacy. Prison, or any alternative, *should* induce some burden on the person being punished. Typically this involves some " 'affirmative disability or restraint.' " *Smith* v. *Doe*, 538 U. S. 84, 99 (2003) (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168 (1963)). A lack of privacy, in addition to serving the security interests noted in *Hudson*, also helps to punish convicted criminals. While parole is a lesser punishment than prison, it is still a punishment. The search condition advances the interests of keeping Californians safe, fostering rehabilitation, and making sure that the sentence continues to punish the lawfully convicted criminal.

The criminal conviction substantially diminishes the parolee's reasonable expectation of privacy. A person committing a crime in California is responsible to know that he or she can be subject to the near complete deprivation of privacy inherent in a prison sentence, or the lesser deprivation of the parole search condition. While the state's authority to punish is limited by the Eighth Amendment, given the considerable deference given to noncapital sentences under the Eighth Amendment, see *Ewing* v. *California*, 538 U. S. 11, 25 (2003) (plurality), there is no credible Eighth Amendment claim against the California search condition.

While it requires careful application in constitutional law, "the proposition that greater powers include lesser ones" is still

valid as a matter of logic. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 511 (1996) (plurality opinion). The problems with its application to constitutional law have come from improper use in First Amendment cases. See Scheidegger, Habeas Corpus, Relitigation and the Legislative Power, 98 Colum. L. Rev. 888, 953-954 (1998). In *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328 (1986), this Court held that the power to ban gambling necessarily included the lesser power to prohibit the advertising of gambling. See *id.*, at 345-346. The subsequent disapproval of *Posadas* correctly notes that regulating speech is not a lesser included power of regulating conduct. "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." *44 Liquormart, supra*, at 512.

That has not happened in this Fourth Amendment case. Parole is not qualitatively different from incarceration in the way that speech is qualitatively different from conduct. "Probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service," *Griffin*, 483 U. S., at 875, and parole is simply another point on that continuum. What happened to Samson was less intrusive to his privacy interests than what the state could have done had it chosen to withdraw parole as an alternative to prison. This lesser deprivation must also be deemed reasonable in light of what Samson could have faced in prison.

Defendant was a convicted criminal who was serving part of his sentence in the community. In order to protect the community, Samson was subject to warrantless, suspicionless searches by any law enforcement officer as a condition of being given the relative freedom of parole. This case is about giving the state and criminal defendants the freedom to craft alternative punishments to imprisonment. A state should be given the

freedom to craft alternatives to prison that still punish while maintaining public safety.

The balance of society's interests and the defendant's privacy expectations favors the search. The threat to public safety posed by parolees creates a special interest in deterring probationer's criminal tendencies through the prospect of warrantless searches by police officers without regard to the searching officer's motive. See Part I, *supra*. As demonstrated above, defendant's expectation of privacy "that society recognizes as 'legitimate,' " *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 654 (1995), is small. A search subject to the parole search condition as interpreted by the California courts is reasonable.

Upholding this search would encourage creative alternatives to prison. Both society and those parolees who genuinely wish to reform would benefit by upholding the search of Samson. A judicial rejection of this condition of Samson's conditional release will lead to more crime and further pressures to limit parole.

CONCLUSION

The decision of the California Court of Appeal should be affirmed.

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Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation